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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE S. LEACH,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

and

LOCAL 43, NATIONAL ASSOCIATION OF
LETTER CARRIERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF IN OPPOSITION FOR RESPONDENTS
NATIONAL ASSOCIATION OF LETTER CARRIERS,
LOCAL 43, VINCENT SOMBROTTO, ED FISBECK
and ED STRUNCK**

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QUESTION PRESENTED

Whether a writ of certiorari should be granted to determine the statute of limitations applicable to petitioner's action against union respondents where his claim would be barred under any arguably relevant limitation period currently before the Court in Delcostello v. International Brotherhood of Teamsters, 679 F.2d 879 (4th Cir. 1982), cert. granted, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 81-2386) and United Steelworkers of America v. Flowers, 671 F.2d 87 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 81-2408)?

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No. 82-1667

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STATEMENT OF THE CASE

Petitioner was employed by the United
States Postal Service ("the Postal Service") in

Cincinnati, Ohio. He was a member of Local 43 of the National Association of Letter Carriers ("Local 43"). By notice given August 29, 1978, petitioner was discharged from employment with the Postal Service, effective October 5, 1978.

Local 43 protested the discharge throughout the grievance procedure set forth in Article XV of the collective bargaining agreement between the Postal Service and the National Association of Letter Carriers ("NALC" or "the Union"). Local 43 ultimately requested arbitration of petitioner's discharge.

On February 20, 1979, Local 43 represented petitioner at an arbitration hearing before Arbitrator Alan Walt. By opinion and award dated February 20, 1979, Arbitrator Walt denied the grievance, thereby sustaining petitioner's discharge (A 54-66).*

On October 6, 1980, petitioner filed

* References to the appendix in the Court of Appeals are denoted "A ____". "Pet. ____" refers to the petition herein. "Pet. ____a" refers to the appendices to the petition.

a complaint alleging breach of the duty of fair representation by Local 43, the NALC and certain individual local and national union representatives (Pet. 23a). The complaint was filed over nineteen months after Arbitrator Walt issued his award.

By order dated and filed August 5, 1981, the district court granted all defendants' motions for summary judgment on the ground that petitioner's action was barred by Ohio's ninety-day statute of limitations governing actions to vacate arbitration awards (Pet. 13a). Petitioner's action was dismissed by the district court by judgment entered August 5, 1981 (Pet. 12a).

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. By decision filed January 17, 1983, the court of appeals affirmed the judgment of the district court (Pet. 1a).

REASON THE WRIT SHOULD BE DENIED

Petitioner's Action Against Union Respondents is Barred Under Any Limitations Standard Adopted By the Court.

The ruling of this Court in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), applied the state arbitration limitation to wrongful discharge actions against employers. After Mitchell, the circuit courts of appeals have applied a variety of limitation standards to fair representation suits against unions. Under any arguably relevant limitation period now before the Court, petitioner's action is barred.

On April 25, 1983, the Court heard argument in two cases which raise the question of which limitations period should be applied to fair representation suits against unions. In Delcostello v. International Brotherhood of Teamsters, 697 F.2d 879 (4th Cir. 1982), cert. granted, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 81-2386), the Fourth

Circuit applied Maryland's thirty-day period governing actions to vacate arbitration awards. In United Steelworkers of America v. Flowers, 671 F.2d 87 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 81-2408), the Second Circuit applied New York's three-year nonmedical malpractice statute of limitations.

These cases have presented the Court with the question of whether fair representation actions against unions should be governed by the six-month limitations period set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), or by the appropriate state arbitration limitation.*

* Petitioner here has suggested that a six-year limitation period should be applied to actions against federal employers such as the Postal Service (Pet. 5-8). This issue is not raised by the two cases currently before the Court. Petitioner concedes, however, that this provision does not apply to private parties such as unions. Accordingly, this claim will not be addressed by union respondents herein. (cont'd.)

The Court's action on the cases now before it cannot add to the reviewability of the instant case. The issues raised in those cases, and by petitioner here, also do not warrant holding this petition in abeyance until determination of Delcostello and Flowers.

Petitioner's claim against the Union respondents is barred regardless of which limitation period this Court adopts. Petitioner filed his action nineteen months after Arbitrator Walt issued his award. Thus, his action is barred under both the six-month limitation set forth in §10(b) of the National Labor Relations Act and the Ohio statute providing a ninety-day limitation on actions to vacate an arbitral award.

(cont'd.)

Petitioner also asserts that the court below should not have applied Mitchell retroactively. This question is already raised in Delcostello. Even if the Court finds that Mitchell may not be applied retroactively, such a determination would be irrelevant to disposition of petitioner's claim, which would be time barred under any limitation period adopted by the Court in the cases now before it.

Petitioner's suit is also barred if the Court adopts the Flowers nonmedical malpractice rule. Ohio law provides a one-year limitation period governing actions for various torts and for malpractice. Ohio Revised Code Section 2305.11 (copy annexed hereto as Appendix A). The Ohio courts have explicitly applied this statute to legal malpractice. Keaton Co. v. Kolby, 27 Ohio St. 2d 234 (Sup. Ct. 1971); Hibbett v. Cincinnati, 4 Ohio App. 3d 128 (Ct. App. 1982).

Thus, any ruling by the Court on the limitations questions in the cases before it can have no effect on the correctness or reviewability of the decision below.

CONCLUSION

The petition for writ of certiorari
should be denied.

Respectfully submitted,

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APPENDIX A

§2305.11 [Time limitations for bringing certain actions; definitions.]

(A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, hospital, or dentist, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that indivi-

dual, then an action by the individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital or a dental claim against a dentist be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, hospital, or dentist apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital.

(C) A civil action for nonconsensual abortion pursuant to section 2919.12 of

of the Revised Code must be commenced within one year after the abortion.

(D) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority responsible for the operation of any hospital licensed or registered in the state, including without limitation those which are owned or operated by the state, political subdivisions, any person, corporation, or any combination thereof. Such term further includes any person, corporation, association, board, entity, or authority responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care and treatment to individuals. It does not include any hospital operated by the government of the United States or any branch thereof.

(2) "Physician" means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(3) "Medical claim" means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person.

(4) "Podiatrist" means all persons who are licensed to practice podiatric medicine and surgery by the state medical board.

(5) "Dentist" means all persons licensed to practice dentistry by the state dental board.

(6) "Dental claim" means any claim asserted in any civil action against a dentist arising out of a dental operation or the dental diagnosis, care, or treatment of any person.